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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER, KOHLER CO.

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REPLY BRIEF FOR THE PETITIONER, KOHLER CO.

THE BOARD CONCEDES THE UNION'S UNLAWFUL CONDUCT

The Board concedes, (Brief p. 12), the Company's position that the Union engaged in "belly-to-back" mass picketing, attended by violence, which prevented non-strikers from entering the plant and kept the plant shut down from April 5 to May 28, except for 3

days; and that it continued this unlawful and violent conduct until restrained by an order of the Wisconsin Employment Relations Board.[1]

Thus this case presents no factual question as to the Union's unlawful conduct or its nature.

With respect to the Company's conduct, the Board's brief deals only in invective and not in facts.

THE BOARD OVERREACHED IN FINDING A REFUSAL TO BARGAIN

The Board's brief (p. 10) states "Throughout the subsequent negotiations the Company insisted on the Union's acceptance of one or the other of these two 'packages' ".

The Board's conclusion that the Company's alleged insistence on acceptance of one or the other of its alternative proposals was a refusal to bargain is erroneous as a matter of law. Furthermore it has no factual basis. It ignores the Trial Examiner's finding, based on the evidence and summaries of negotiations of the Union's chief negotiator, that during the period June 1 to 25, 1954, the Company did make important concessions on the major issues. (128 NLRB at 1170; J.A. 187-188)

The Board concedes that the Company at all times had on the bargaining table, not merely one, but two

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[1] The order of the Wisconsin Employment Relations Board was sustained in *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266.

The Board's present decision holds that conduct which this Court has held may properly be enjoined is nevertheless permissible and is to be condoned and rewarded by reinstatement with back pay.

alternate proposals, either of which it was willing to execute as a contract.

It is clear beyond argument that:

1. The Company was not refusing to enter into a contract but was at all times willing to enter into either of two alternative contracts.

2. The Board has here arrogated to itself a power forbidden to it by the statute and the decisions of the courts, i.e., that of sitting in judgment on the substantive terms of the contract. *Act* Sec. 8(d), 29 USC § 158(d), *N.L.R.B.* v. *American Insurance Co.*, 343 US 395, 404; *N.L.R.B.* v. *Insurance Agents Int'l. Union*, 361 US 477, 486; *Armco Steel Corp.* v. *N.L.R.B.*, 344 F. 2d 621, 624 (6th Cir.)

The Board, both in its decision and in its brief, engages in a lengthy critique of the Company's bargaining *proposals*, a power repeatedly forbidden to it.[2]

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[2] The Board's critique of the bargaining proposals is patently erroneous in respects too numerous to deal with seriatim.

The following are illustrative:

The Company is accused of seeking to reduce non-monetary benefits (Supp. J.A. 2353), ignoring the undisputed fact that one of the Company's alternative proposals was to renew the old contract for one year *without change*.

Similarly the Company is accused of seeking to withdraw a "prior commitment" to consider the determinations of the arbitrator as to his jurisdiction or arbitratibility (Supp. J.A. 2353, n. 14). This ignores the finding of its own Trial Examiner that the former contract contained a provision for "judicial challenge in the event of a dispute concerning either the jurisdiction of an arbitrator or whether a grievance was arbitrable" hence contained no such "prior commitment". (128 NLRB at 1159; J.A. 161; See also Supp. J.A. 2396 for the contractual provision for such "judicial challenge").

BOARD'S MISSTATEMENT OF COMPANY POSITION

The statement in the Board's brief (p. 19, n. 9) that "The Company does not now challenge the propriety of the unfair labor practice findings sustained by the Court of Appeals" is totally unwarranted. The finding that the strike was an unfair labor practice strike or due to a refusal to bargain is clearly challenged on pages 5 and 10 of our petition.

We do emphatically challenge the propriety of any finding that the Company was refusing to bargain when it was making, not one but two complete contract proposals, particularly where, as here, its positions on the bargaining demands of the Union were, as found by both the Trial Examiner and the Board itself, "supported by legitimate and, in the main, reasonable arguments". (128 NLRB at 1069, 1153; J.A. 19, 146).

We also challenge the propriety of any finding that the strike was caused or prolonged for a reason *never even mentioned by the Union,* i.e., the 3¢ per hour wage increase. The Board completely ignored the *Union's own statement* of its reasons for striking and continuing its strike, i.e., because its economic demands had not been satisfied. (J.A. 2203-2205).

Thus the Board found the strike due to reasons different than the reasons understood by *both* the Union and the Company. Here as in *N.L.R.B.* v. *Ford Radio & Mica Corp.,* 258 F. 2d 457, 464 (2d Cir.), the Company is held guilty of an unfair labor practice on the ground that it was later outguessed by the Board in divining the true purpose of the strike. Not only this, but in the instant case the Board seeks to outguess even the Union as to the real reason for the strike. In *Ford Radio & Mica Corp.* the Court condemmed placing the employer in the position of having to guess at his

peril the purpose behind the strike. Under the Board's decision in the instant case the Company was placed in the position of having to guess at its peril an alleged purpose of the strike, not merely unannounced, but different from the purposes announced by the Union.

THE BOARD'S FURTHER OVERREACHING

Seldom, if ever, in a single case, has there been such an overreaching of its powers by the Board. It assumes authority:

1. To overrule the findings and order of a predecessor Board.

The Board grounds its finding on alleged derelictions of the Company dating back to 1933, two years before the passage of the Act, and seeks to apply "present day standards" to the Company's *past* conduct. (Supp. J.A. 2343).

The Board now argues (Brief p. 3) that the KWA was in effect a "Company dominated" union and that the Company "[S]ince 1933, has consistently refused to honor its collective bargaining obligations..." (Supp. J.A. 2359)

In 1933 the same charges of company domination which the Board now argues were made, heard, and rejected by the former National Labor Relations Board (under Sec. 7-A of the National Recovery Act). The Company was directed to recognize the KWA which had won an election conducted by that Board. (128 NLRB at 1146; J.A. 130).

The Board now, 30 years later, not only reverses this decision but gives its reversal *ex post facto* application as the primary basis for a finding

that the Company "[S]ince 1933, has consistently refused to honor its collective bargaining obligations..." (Supp. J.A. 2359)

2. To set aside the results of prior elections and certifications, including its own certification.

In 1946 the KWA again won an election, conducted by the Wisconsin Employment Relations Board, and was again certified. (128 NLRB at 1146; J.A. 130).

In 1951 in an election conducted by *this very Board,* and involving this same union, the UAW, the KWA again won and *was certified.*

If the Board's present charge that the KWA was "Company dominated" had any validity it could and would have been made after the 1951 election and the election set aside.

The Board now repudiates the results of these impartially conducted elections and *its own certification* on the basis of these stale charges and grounds its finding of law violation by the Company on such *ex post facto* repudiation.

During all this period that the present Board now finds that the Company "consistently refused to honor its collective bargaining obligations" the Company was:

1. Recognizing the representative chosen by a majority of its employees.

Three times during that period the Company's employees were afforded an opportunity to and *did* exercise their "lawful rights" to choose a bargaining representative, rights now alleged

by the Board to have been held in "flagrant disregard" by the Company. (Supp. J.A. 2359, n. 20).

The Company honored its employees' choice. The Board now seeks, *nunc pro tunc,* to dishonor that choice. The Board patently misconstrues the Company's "collective bargaining obligation". That "obligation" was to recognize the union freely chosen by a *majority of its employees,* not a union favored by the *present* Board members.

2. Complying with the certifications of authorized administrative bodies—including the Board's own certification.

For the Board to term such actions by the Company a refusal to honor its collective bargaining obligations or a flagrant disregard of employee rights is sheer sophistry and the substitution of invective for fact.

THE ALLEGED BAD FAITH ADMINISTRATION OF THE CONTRACT

The Board's brief in support of its finding that the Company administered the grievance provisions of the 1953 contract in bad faith (Board brief p. 7; Supp. J.A. 2351) illustrates another arrogation of a power which the Board was expressly denied by Congress.

Congress considered making contract violations an unfair labor practice but rejected that proposal, saying—

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (House Conference Report No. 510, 80th Cong. 1st Session

p. 42; Legislative History of the Labor-Management Relations Act 1947, p. 546).

Repeated decisions of this Court have emphasized that the enforcement mechanism of the contract, i.e. arbitration, is the sole means of interpretation and enforcement of compliance with the terms of the contract. *Steel Workers* v. *American Manufacturing Co.*, 363 U.S. 564, *Steel Workers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, *Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, *Republic Steel Corp.* v. *Charlie Maddox*, 85 S. Ct. 614

The contract now alleged by the Board to have been administered in bad faith defined a "grievance" as "any difference arising out of the application or interpretation of any provision of this contract" (Supp. J.A. 2391) and gave the arbitrator "final and binding" authority over interpretation and claims of violation of the contract. (Supp. J.A. 2395).

The Union took three cases to arbitration during the life of the contract, winning two and losing one. (128 NLRB at 1159; J.A. 161).

The Board now makes the incredible assertion that, although the Union took three relatively minor matters to arbitration, it nevertheless tolerated such bad faith violations of the contract as to amount to virtual sabotage of the entire grievance procedure without *even attempting* to enforce its contractual rights by arbitration!

The Board may not under the guise of a finding of "bad faith" grant itself the power to interpret and determine compliance with a contract—a power delib-

erately denied to it by Congress and reserved by the express terms of the contract to an arbitrator.

CASES DISTORTED BY THE BOARD

The Board urges (Brief p. 22, n. 13) that its concept of a "Thayer doctrine" has been followed by other courts.

The cases cited by the Board, *with the exception of the very case now being appealed from,* (300 F. 2d 699), do not support the Board's "balancing" theory.

In *Puerto Rico Rayon Mills* the Court sustained the Board's finding that the *real* reason for the refusal to reinstate was, not the misconduct of the employees, but to discourage union membership, (*N.L.R.B.* v. *Puerto Rico Rayon Mills, Inc.,* 293 F. 2d. 941 at 948 (1st Cir.)). In other words the misconduct was found to be only a *pretext* for the refusal to reinstate.

Here the Board has specifically found that the strikers' unlawful conduct was the *real* reason for the discharges and not a pretext. (128 NLRB at 1102, n. 63; J.A. 65, n. 63).

The Court in the *Puerto Rico Rayon Mills* case did not engage in "balancing" unlawful striker conduct against alleged employer unfair labor practices.[3]

Nor does *N.L.R.B.* v. *Wallick,* 198 F. 2d 477 (3d Cir.) support any theory of "balancing" unlawful conduct against employer unfair labor practices.

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[3] In the *Puerto Rico Rayon Mills* case (at p. 947), as to the loom fixers alleged to be supervisory employees, the Court interprets the *Thayer* case as do we, that it holds only that the Board may order reinstatement where the activity is merely "unprotected" but not unlawful.

On the contrary the Court held (p. 485) "The strike of July 5 even if *unprotected,* was in no sense *unlawful".* (emphasis supplied)

The Court clearly distinguished between conduct merely unprotected and conduct which was *unlawful.*

It specifically held, following *Fansteel,* that the policies of the Act would not be effectuated by reinstatement of strikers who engaged in violence or unlawful conduct. (p. 484)

N.L.R.B. v. *Wichita Television Corp.,* 277 F. 2d 579 (10th Cir.) likewise offers no support for any "balancing" theory. The Court, after noting that there was evidence of acts of a serious nature (p. 585) held that "[T]here was no proof that any identified striker... took part in such acts".

Here the Board concedes that the discharged strikers engaged in the unlawful conduct for which they were discharged. (Board brief p. 12; 128 NLRB at 1102, n. 63; J.A. 65, n. 63).

The cases cited in our petition cannot be distinguished on the grounds advanced by the board.

The statement (Board brief p. 24, n. 15) that the *International Ladies Garment Workers Union* v. *N.L.R.B.* case, (237 F. 2d 545 (D.C. Cir.)) involved "no employer unfair labor practice that could be said to have provoked the employee misconduct" (Board brief p. 24, n. 15) is incomprehensible.

In that case the Court (at p. 547) sustained a Board finding of unfair labor practices through interference with organizational activities.

The Board blandly tells the Court that Kohler's alleged interference with organizational activities pro-

voked unlawful conduct but that in the *International Ladies Garment Workers* case *actual* interference could not be said to "have provoked the employee misconduct".

This highlights the subjective and inconsistent nature of findings which would be made under the Board's "balancing" theory. This "balancing" theory substitutes *personal opinion* for a rule of law.

In *N.L.R.B.* v. *Clearfield Cheese co.*, 213 F. 2d 70 (3d Cir.), the Court (at p. 74) affirmed the Board's finding that the cause of the strike was the employer's refusal to bargain. The Court did not "balance" that unfair labor practice against the misconduct of strikers who barred access to the plant but held that they had forfeited their right to reinstatement. (at p. 75).

The decision is obviously inconsistent with the Board's present interpretation of *Thayer*.

N.L.R.B. v. *Blades Mfg. Corp.*, 344 F. 2d 998, 1004 (8th Cir.) and *N.L.R.B.* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457, 464 (2d Cir.) specifically interpret *Thayer* as denying the Board power to order reinstatement when the discharge was for cause.

In *W. T. Rawleigh Co.* v. *N.L.R.B.*, 190 F. 2d 832 (7th Cir.) the Board found unfair labor practices on the part of the employer.[4] The employer chose not to contest the e findings before the Court (at p. 835). The Court engaged in no "balancing" but held certain strikers barred from reinstatement by their conduct in preventing access to the plant.

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[4] The Board, in the *Rawleigh* case, (90 NLRB 1924 at 1926) found "a pattern of illegal opposition to the purposes of the Act". This is a finding on all fours with the Board's finding in the case at bar of refusal "to honor its collective bargaining obligation". (Supp. J.A. 2359)

The Court's decision in *Rawleigh* is clearly inconsistent with the Board's present interpretation of *Thayer*.

CONCLUSION

The Board's decision in this case, if allowed to stand, establishes a rule of men not of *law*.. When an administrative board assumes to reverse decisions of prior boards, going back as far as 30 years, it is evident that its decisions are based on personal predelictions, not on law.

The "balancing" theory advocated by the Board substitutes subjective considerations for the test of law.

The anamolous results inevitably flowing from such subjective considerations is well illustrated in this case. Here the Board holds that a "threat of violence directed toward the family or a non-striker" by a single striker or a small group of strikers forfeits any right to reinstatement (Supp. J.A. 2365), but condones the much more intimidating threat to families of non-strikers by mobs of 500 to 700 (Supp. J.A. 2361).

We submit that again, as in *American Shipbuilding Corp.* v. *N.L.R.B.*, 85 S.Ct. 955, the Board's assumption or authority to define national labor policy should be reversed.

Respectfully submitted,

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